No. 20,120

United States Court of Appeals

For the Ninth Circuit

LOUIS HORNER, JOHN L. CONNOLLY, VICTOR ROMERO, JAMES RIEMERS, and HUGH BELL for the benefit of THE PACIFIC COAST DISTRICT OF NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, an unincorporated association,

Appellants,

vs.

W. A. FERRON, HENRY A. BORELLO, W. H. BUTTRAM, ROBERT H. HORNE, C. W. JENKINS, HARRY LEWIS, R. H. ROBINSON, F. E. WALTON, C. BLACK, H. COLEMAN, S. R. FRANKS, GEORGE B. SALOVICH, FRODE ANDERSEN, FRANCIS H. ROGERS, CHEMICAL BANK NEW YORK TRUST COMPANY, a New York corporation, and FIRST DOE through TENTH DOE, inclusive,

Appellees.

Appeal from an Order Denying Application and Motion to File Complaint, of the United States District Court for the Northern District of California, Southern Division

Honorable George B. Harris, Chief Judge

BRIEF FOR APPELLEES

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No. 20,120

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STATEMENT OF THE CASE

A

Statement of Facts

This is an appeal from an order of the United States District Court, Northern District of California, Southern Division (Harris, Chief Judge) denying appellants' application and motion to file a complaint under the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519 *et seq.,* 29 U.S.C. §401 *et seq.* (hereinafter referred to as LMRDA). The order was entered after two hearings were held in the District Court, at which witnesses were examined, upon affidavits, and the record in Action No. 41678, pending before the same District Judge in the District Court. (R.T. March 31, 1965; R.T. April 15, 1965; C.T. 76, 79, 112. The record in Action No. 41678 was before the District Court and referred to by the parties in argument, affidavit and memoranda, e.g., R.T. March 31, 1965, pp. 2, 8; C.T. 77, 100, 101, 102, 104, 128, 129.)

On May 1, 1959 the National Marine Engineers' Beneficial Association and certain of its subordinate associations, including Association No. 97 (hereinafter referred to as Local 97) entered into a trust agreement with the Chemical Corn Exchange Bank, a New York corporation, to provide for a retirement and severance program for union officials known as the "MEBA Retirement and Severance Plan." (C.T. 1K, 16.) On April 1, 1962, Local 97 was merged with other local labor organizations on the Pacific Coast to form an organization known as the Pacific Coast District

of the National Marine Engineers' Beneficial Association (hereinafter referred to as the District). (R.T. March 31, 1965, pp. 28-29.) The referendum under which the District was formed provided that it would assume all the obligations of the individual locals. One of the obligations assumed was that of Local 97 to contribute to the MEBA Retirement and Severance Plan. (R.T. March 31, 1965, pp. 30-31.) The payments made to the plan are posted quarterly as part of the District's financial report, which is subject to the approval of members of District. (R.T. March 31, 1965, p. 31.)

On August 6, 1963, three of the five appellants herein (Louis Horner, John L. Connolly and Victor Romero) filed Action No. 41678 in the District Court. (C.T. 76, 99; compare captions C.T. 21, 65.) The original complaint in Action No. 41678 was permitted to be filed ex parte without an opportunity afforded to the named defendants to be heard in opposition to its filing. (Supp. C.T., memorandum of points and authorities attached to appearance of the Pacific Coast District, etc., p. 10.) On December 5, 1963, the plaintiffs in Action No. 41678 filed a motion for leave to file an amended complaint. (Supp. C.T., Notice of Motion, pp. 1 *et seq.*) The purpose of the proposed amended complaint was to add two additional defendants to that action namely: the District and the National Marine Engineers' Beneficial Association.[1] The

[1]The complaint and the proposed amended complaint in Action No. 41678 also named four of the appellees herein (W. A. Perron, Henry A. Borello, Robert H. Horne and George B. Galovich).

allegations in the proposed amended complaint in Action No. 41678 were identical in substance to those in the proffered complaint which the District Court denied leave to file in this action. (R.T. March 31, 1965, p. 8; compare C.T. 65, *et seq. with* Supp. C.T. First Amended Complaint attached to Notice of Motion in Action No. 41678.) The District appeared in Action No. 41678 to oppose filing of the amended complaint. (Supp. C.T., Appearance of Pacific Coast District, etc.) On December 20, 1963, after argument and briefs, the District Court entered an order denying the motion requesting leave to file the amended complaint. (C.T. 64-a.) No appeal was taken from that order.

On March 31, 1965, appellants sought leave to file the complaint here under consideration. (C.T. 74; R.T., March 31, 1965.) The only significant difference, with respect to the District, between the proposed amended complaint in Action No. 41678 and the proposed complaint in this action is that in Action No. 41678 the District was named as a defendant and the complaint proposed herein purports to be for the benefit of the District as a plaintiff. An affidavit was filed in behalf of the District opposing the motion for leave to file the complaint herein. (C.T. 79.) A memorandum of points and authorities was also filed opposing the motion. (C.T. 99.) As indicated, two hearings were held on the motion where argument was made and testimony taken.

The evidence indicated that appellant Horner, the only person to verify the proposed complaint, was no

a member in good standing of the District at the time appellants sought leave to file it. (R.T., April 15, 1965, pp. 5-10.) There was evidence that Horner was a pensioner and not an active seaman; that appellant Romero was a real estate saleman and had not been to sea since 1954; that appellant Riemers was retired on social security and that appellant Bell was the only active seaman among appellants. (R.T., March 31, 1965, pp. 49-50.) The record also indicated that, even assuming for the sake of argument only, the MEBA Retirement and Severance Plan was improperly adopted, the plan was ratified by the membership of District. (R.T., March 31, 1965, pp. 15-17, 30-31; Exhibits A, B, C, D, E, F, G attached to affidavit of Wesley A. Ferron, C.T. 80.) The record also discloses that internal union remedies are available to appellants in connection with the issues they seek to raise in the proposed complaint. (C.T. 138.) The National MEBA Constitution is attached to the affidavit of W. A. Ferron in Supp. C.T. as well as a copy of District's By-Laws. The By-Laws are also found in Exhibit H attached to the affidavit of Wesley A. Ferron. See also R.T., March 31, 1965, p. 43.)

B

Preliminary Comments

Nowhere do appellants claim that it was beyond the power of the District (ultra vires) to adopt and participate in the MEBA Retirement and Severance Plan. Nor do appellants contend that even if the plan were improperly adopted, it could not have been

or could not be ratified at any time by the members of the District.

Appellees, including the District, take the position in Action No. 41678 and in this action that the MEBA Retirement and Severance Plan was duly authorized by the District's predecessor, Local 97. (E.g., Supp. C.T., Affidavit of W. A. Ferron, etc., p. 2.) The statement at page 20 of Appellants' Brief that "Appellees did not dispute that the Plan was initially unauthorized . . ." is not correct. The District Court had before it the record in Action No. 41678. Appellees referred to this record in the Memorandum of Points and Authorities opposing the filing of the proposed complaint herein. (C.T. 99, 100, 101, 102.) After so referring to Action No. 41678, and seeing no need to repeat the arguments and affidavits there presented, appellees took the further position that "Therefore, *even assuming for the purpose of this hearing* that the original authorization of the union membership for the severance pay plan was in some way faulty, said plan has been ratified, affirmed and adopted by the full union membership in accordance with democratic procedures." (Emphasis added; C.T. 103.) Appellees then produced evidence on the question of ratification, most of which had not been before the Court in Action No. 41678.)

The resolution under which the MEBA Retirement and Severance Plan for MEBA officials was adopted, and the plan itself, provide for a contributory plan; in addition to the union, contributions are required from and paid by each of the officials covered under

the plan. (C.T. 2-3, 29.) On the other hand, the Pacific Maritime Association Pension agreement, under which MEBA members are covered, is a non-contributory plan for which the members pay nothing at all for their pension benefits. (C.T. 31 *et seq.*) If a District official is eligible for both the MEBA Retirement and Severance Plan and the PMA Plan, he must choose one, as the District will only make a payment to one Plan. (R.T., March 31, 1965, pp. 46-48.)

ARGUMENT

I

SUMMARY OF THE ARGUMENT

Appellees contend that the order of the District Court denying leave to file the proposed complaint under Section 501(b) of LMRDA should be affirmed because the statute is not retroactive and therefore the District Court lacked jurisdiction to entertain a proposed complaint dealing with matters which occurred prior to the enactment of LMRDA. The order should also be affirmed because appellants were precluded from bringing the proposed action by reason of a final adverse determination on the same subject matter in Action No. 41678 in the District Court.

In addition, the order should be affirmed because the question of whether good cause existed to permit filing of the proposed complaint was duly considered and decided adversely to appellants in the sound discretion of the District Court. In this connection and

along with the grounds heretofore stated, the record sustains the valid exercise of the District Court's discretion, since it was demonstrated below that (1) The appellant Horner who verified the proposed complaint was not a member in good standing of the District—he had no standing to sue and no proper verified complaint was before the Court; (2) The MEBA Retirement and Severance Plan was properly adopted; (3) Even if it be assumed, arguendo, that the MEBA Retirement and Severance Plan was not properly adopted initially, it was duly ratified by the members of District; (4) Appellants did not exhaust their internal union remedies; (5) The proposed complaint is stale and barred by the statute of limitations; and (6) Appellants did not comply with Rule 23(b) of the Federal Rules of Civil Procedure.

II

GENERAL RULES GOVERNING THIS APPEAL

a. If There Is Anything in the Record to Sustain the Order of the District Court, It Must Be Affirmed on Appeal.

If there is anything in the record to sustain the order of the District Court denying permission to file the proposed complaint, the order must be affirmed on appeal.

> "A successful party in the District Court may sustain its judgment on any ground that finds support in the record." (*Jaffke v. Dunham*, 352 U.S. 280, 281, 77 S.Ct. 307, 308, 1 L.Ed.2d 314,

cert. denied, 355 U.S. 835, 78 S.Ct. 55, 2 L.Ed.2d 46.)

Town of South Tucson v. Tucson Gas, Electric & Pow. Co. (9th Cir. 1945) 149 F.2d 847, 847-48;

Aetna Insurance Company v. Eisenberg (8th Cir. 1961) 294 F.2d 301, 308.

b. The Burden of Showing Grounds Why the Order Appealed From Should Be Reversed Is on Appellants.

Appellants have the burden on appeal of showing grounds why the District Court's order denying leave to file the proffered complaint should be reversed.

"The rule in the federal courts is that the burden of showing grounds on which a judgment should be reversed rests on the appellant." (*Empire Dist. Electric Co. v. Rupert* (8th Cir. 1952) 199 F.2d 941, cert. denied, 345 U.S. 909, 73 S.Ct. 649, 97 L.Ed. 1344.)

Jernigan v. Southern Pacific Company (9th Cir. 1955) 222 F.2d 245;

Calhoun v. Bernard (9th Cir. 1964) 333 F.2d 739, 741.

c. The Question of Permitting Filing of the Proposed Complaint Was Addressed to the Sound Discretion of the Trial Court.

The order from which appellants appeal is one which denied their motion to file a complaint under the LMRDA. (C.T. 64-a.) Findings of fact and conclusions of law were not made or necessary upon the entry of the order.

> ". . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." (Fed. Rules Civ. Proc., Rule 52(a).)

The question of whether to permit the complaint to be filed was one addressed to the discretion of the District Court. (LMRDA §501(b).) If there is any basis upon which the District Court's exercise of discretion can be sustained, the order appealed from herein must be affirmed.

> "And in passing upon whether the trial court acted within its judicial discretion, we must interpret every intendment in favor of the legality of the court's action." (*Los Angeles Jr. D. & M. Exch. v. Securities & Exch. Com'n* (9th Cir. 1960) 285 F.2d 162, cert. denied, 366 U.S. 919, 81 S.Ct. 1095, 6 L.Ed.2d 241.)

> "In a second sense, and the one most commonly meant in the use of the word in the law, 'discretion' is defined as: 'The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court. 1 Bouv. Law Dict., Rawles' Third Revision, p. 884. Judicial action—discretionary in that sense—is said to be final and cannot be set aside on an appeal except when there is an abuse of discretion. . . . If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." (*Delno v. Market St. Ry. Co.* (9th Cir. 1942) 124 F.2d 965, 967.)

See also,

Edsberg v. Local Union No. 12 of Int. U. of Operating Eng. (9th Cir. 1962) 300 F.2d 785;

Highway Truck Drivers & Helpers, Etc. v. Cohen (3rd Cir. 1960) 284 F.2d 162, cert. denied 365 U.S. 833, 81 S.Ct. 747, 5 L.Ed. 2d 744.

d. The Evaluation of Credibility of Witnesses, in the Exercise of Discretion, Was for the Trial Court.

As indicated, the District Court heard testimony before exercising its discretion on appellants' motion for leave to file the proposed complaint. Insofar as the order here under consideration rests upon conflicting testimony or the credibility of witnesses it is unassailable.

Adamson v. Gilliland, 242 U.S. 350, 353, 37 S. Ct. 169, 170, 61 L.Ed. 356, 357-358;

Broadcast Music v. Havana Madrid Restaurant Corp. (2nd Cir. 1949) 175 F.2d 77, 80;

Petition of J. E. Brenneman Company (3rd Cir. 1963) 322 F.2d 846, 852.

e. Federal Courts, Under LMDRA, Should Not Intervene in Every Intra-Union Dispute.

"The federal courts, of limited jurisdiction, cannot and should not intervene in any and every intra-union dispute."

(*Edsberg v. Local Union No. 12 of Int. U. of Operating Eng.* (9th Cir. 1962) 300 F.2d 785, 788.)

III

THE DISTRICT COURT PROPERLY DENIED APPELLANTS' APPLICATION AND MOTION TO FILE COMPLAINT BECAUSE OF LACK OF JURISDICTION

Appellants sought to file this action under authority of the LMRDA. It is undisputed that the MEBA Retirement and Severance Plan was established on May 1, 1959. (C.T. 1K, 67.) The LMRDA became effective on September 14, 1959. The provisions of the LMRDA are not retroactive. (*Smith v. General Truck Drivers, Etc., Union Local 467* (S.D. Cal. 1960) 181 F.Supp. 14, 18; *Flaherty v. McDonald* (S.D. Cal. 1960) 183 F.Supp. 300, 304; *Highway Truck Drivers and Helpers Local 107 v. Cohen* (E.D. Pa. 1960) 182 F.Supp. 608, 611; *Holton v. McFarland* (D. Alaska 1963) 215 F.Supp. 372, 376.) The complaint sought to be filed by appellants is an attempt to attack a plan which was in existence prior to the time LMRDA became effective. The allegations relating to contributions which have periodically been made to the plan since April 15, 1962 are based upon the premise that the agreement of May 1, 1959, which established the plan, was not properly authorized. (C.T. 67.) All the events relating to the adoption of the MEBA Retirement and Severance Plan occurred on or before May 1, 1959. If the plan were improperly adopted the cause of action accrued on that date. (*Conlin v. United States* (Ct. Cl. 1956) 146 F.Supp. 833, 835, cert. den. 353 U.S. 916, 77 S.Ct. 663, 1 L.Ed.2d 663.) It has been held that in the case of pension plans that rights dealing with periodic payments are continuing ones only after the basic right has been established.

> ". . . Before plaintiff can claim these periodic payments, however, she must establish her right to a pension. . . . An action to determine the existence of the right thus necessarily precedes and is distinct from an action to recover installments which have fallen due after the pension has become granted.
>
> "A cause of action accrues when a suit may be maintained thereon. . . ." (*Dillon v. Board of Pension Commrs.* (Sup. Ct. Calif. 1941) 18 Cal. 2d 427, 430, 116 P.2d 37, 39.)

See also,

> *Santa Cruz, etc. Cement Co. v. Young* (D.C.A. Calif. 1943) 56 Cal.App.2d 504, 507, 133 P. 2d 32, 33.

These allegations in the proposed complaint refer back to the original act of adopting the plan, and the District Court had no jurisdiction to inquire into the plan which was in effect prior to the LMRDA. (*Smith v. General Truck Drivers, Etc., Union Local 467, supra,* 181 F.Supp. 14, 18.) The District Court properly denied appellants' application and motion to file the complaint because it lacked jurisdiction over the subject matter of the proposed complaint.

IV

THE DISTRICT COURT PROPERLY DENIED APPELLANTS' APPLICATION AND MOTION TO FILE COMPLAINT UNDER THE DOCTRINE OF RES JUDICATA OR COLLATERAL ESTOPPEL

On August 6, 1963 three of the five appellants herein (Louis Horner, John L. Connolly and Victor Romero) filed Action No. 41678 in the District Court.

On December 4, 1963, the plaintiffs in Action No. 41678 filed a motion for leave to file an amended complaint. The purpose of the proposed amended complaint was to add two additional defendants to that action namely: The District and the National Marine Engineers' Beneficial Association. The proposed amended complaint in Action No. 41678 named four of the appellees herein (W. A. Ferron, Henry A. Borello, Robert H. Horne and George B. Salovich) and the District as defendants. The allegations in the proposed amended complaint in Action No. 41678 were identical in substance to those in the complaint in this action which the District Court denied leave to file. (Compare Supp. C.T., First Amended Complaint attached to Notice of Motion in Action No. 41678 *with* C.T. 65 *et seq.*) The District appeared specially in Action No. 41678 to oppose filing of the amended complaint. On December 20, 1963 the District Court entered an order denying the motion requesting leave to file the amended complaint. No appeal was taken from that order. On March 31, 1965 appellants sought leave to file the complaint here under consideration. The only significant difference, with respect to District, between the proposed amended complaint in Action No. 41678 and the complaint proposed in this action is that in Action No. 41678 District was named as a defendant and the complaint proposed herein purports to be for the benefit of the District as a plaintiff.

Appellees opposed the motion for leave to file the proposed complaint on the ground, among others, that

it was barred by the final ruling of the District Court in Action No. 41678 denying leave to file the proposed amended complaint in that action.[2] (R.T. March 31, 1965, pp. 2-5; C.T. 100.)

The denial of the motion to file the amended complaint in Action No. 41678 was, as to the District, an adjudication on the merits that the plaintiffs were not entitled to any relief against District under the proffered allegations respecting the MEBA Retirement and Severance Plan. (*Angel v. Bullington,* 330 U.S. 183, 190, 67 S.Ct. 657, 661, 91 L.Ed 832, 837; *Williamson v. Columbia Gas & Electric Corporation,* 91 F.Supp. 874, 877-78, affd. 186 F.2d 464, cert. denied 341 U.S. 921, 71 S.Ct. 743, 95 L.Ed. 1355.)

The order of the District Court in Action No. 41678 entered on December 20, 1963 was, as to District, a final, appealable order. (*Mercantile National Bank v. Langdean,* 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed.2d 523; *Hudson Distributors v. Eli Lilly,* 377 U.S. 386, 389 fn. 4, 84 S.Ct. 1273, 1276 fn. 4, 12 L.Ed.2d 394, 397 fn. 4; *Chapman v. Sheridan-Wyoming Co.,* 338 U.S. 621, 70 S.Ct. 392, 94 L.Ed. 393.) No appeal was taken from the order. It became res judicata as to the parties.

---

[2]There was some uncertainty at the time of the first hearing on the motion whether the proposed complaint was to be considered in Action No. 41678. "The Clerk: Horner and others v. The Marine Engineers Beneficial Association, No. 97, Inc.; and others. Motion for leave to file complaint." (R.T. March 31, 1965, p. 2.) At this juncture counsel for appellees referred to the previous final ruling as "law of the case". (R.T. March 31, 1965, p. 4; C.T. 100.) The record is clear that counsel for appellants understood appellees' contention that the proposed complaint was barred by a final adverse determination in prior litigation. (R.T. March 31, 1965, pp. 9-10, 12.)

Even if it be assumed, for the sake of argument only, that the order was incorrect, it would still be res judicata.

> ". . . a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." (*United States v. Moser,* 266 U.S. 236, 242, 45 S.Ct. 66, 67, 69 L.Ed. 262, 264.)
>
> "The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' (citations omitted)"
>
> *Chicot County Dist. v. Bank,* 308 U.S. 371, 378, 60 Sup.Ct. 317, 320, 84 L.Ed. 329, 334-335.

In the present action appellants seek to avoid the doctrines of res judicata and collateral estoppel by the device of changing some of the parties plaintiff and, instead of bringing an action against the District, purporting to bring the action for the benefit of the District. However, a comparison of the proposed complaint in this action and the proposed amended complaint in Action No. 41678 clearly indicates that

as to the District the purpose of both was to challenge the District's participation in the MEBA Retirement and Severance Plan and, as indicated, res judicata would apply. *(Angel v. Bullington, supra,* 330 U.S. 183; *Williamson v. Columbia Gas & Electric Corporation, supra,* 91 F.Supp. 874.) The changing of certain plaintiffs does not alter the application of the doctrine. The proposed amended complaint in Action No. 41678 was verified only by appellant Horner. (Supp. C.T., Complaint attached to Notice of Motion, p. 9.) The primary material offered in support of the proposed amended complaint in Action No. 41678 was the affidavit of appellant Horner. The only material offered in support of the proposed complaint in this action was the declaration and affidavit of appellant Horner.[3] (C.T. 76, 112.) Appellants Horner, Connolly and Romero who were parties in Action No. 41678 are directly subject to the principles of res judicata as heretofore indicated. Appellant Horner was the only appellant to verify the complaint. In the circumstances appellants Riemers and Bell are in privity with Horner and bound by the principles of res judicata or collateral estoppel. *(Sovereign Camp. v. Bolin,* 305 U.S. 66, 78-79, 59 S.Ct. 35, 83 L.Ed. 45, 51-52; *Ma Chuck Moon v. Dulles* (9th Cir. 1956) 237 F.2d 241, cert. denied, 352 U.S. 1002, 77 S.Ct. 559, 1 L.Ed.2d 547; *Schatte v. International Alliance, Etc.* (S.D. Cal. 1949) 84 F.Supp. 669, affd., 182 F.2d 158, rehearing

[3]Counsel for appellants filed a declaration, not dealing with the merits, with respect to appellants' ex parte request to file the proposed complaint. (C.T. 72.)

denied, 183 F.2d 685, cert. denied, 340 U.S. 827, 71 S.Ct. 64, 95 L.Ed. 608, rehearing denied, 340 U.S. 885, 71 S.Ct. 194, 95 L.Ed. 643; *Gart v. Cole* (2nd Cir. 1959) 263 F.2d 244, cert. denied 359 U.S. 978, 79 S.Ct. 898, 3 L.Ed.2d 929; *Montgomery v. Equitable Life Assur. Soc.* (7th Cir. 1936) 83 F.2d 758; *In Re Dayton Coal & Iron Co.* (E.D. Tenn. 1922) 291 Fed. 390.)

This case is analogous to *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36. In *Munsingwear,* the United States sued the respondent for alleged violations of a price fixing regulation, seeking, in separate counts, (1) an injunction and (2) treble damages. By agreement, the second count was held in abeyance pending trial and final determination of the suit for an injunction. The District Court dismissed the complaint holding that respondent's prices complied with the regulation. While an appeal was pending the commodity involved was decontrolled. Respondent moved to dismiss the appeal on the ground of mootness and the Court of Appeals granted the motion and dismissed it on that ground. The United States acquiesced in the dismissal. Respondent then moved in the District Court to dismiss the treble damage actions on the ground that the unreversed judgment of the District Court in the injunction suit was res judicata of those other actions. The District Court granted the motion and dismissed the treble damage actions. The Court of Appeals affirmed the judgment. The Supreme Court in affirming the judgment stated:

> ". . . If there is hardship in this case, it was preventable. The established practice of the Court

in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in *Duke Power Co. v. Greenwood County,* 299 U.S. 259, 267, to be 'the duty of the appellate court.' That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented by happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

"In this case the United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights. . . .

"The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation." *(United States v. Munsingwear,* 340 U.S. 36, 39-41, 71 S.Ct. 104, 106-107, 95 L.Ed. 36, 41-42.)

Since appellants could have appealed from the denial of the motion to file the amended complaint in Action No. 41678 and they did not do so, the District Court properly denied the motion to file the complaint proffered herein because the previous order was res judicata on the issue that appellants were not entitled to any relief with respect to the District on the allega-

tions respecting the MEBA Retirement and Severance Plan.

V

THERE WAS EVIDENCE FROM WHICH THE DISTRICT COURT, IN ITS DISCRETION, MUST BE ASSUMED TO HAVE FOUND THAT GOOD CAUSE DID NOT EXIST FOR PERMITTING THE FILING OF THE PROFFERED COMPLAINT.

a. Applicable Law.

As indicated, the District Court was not required to file findings and conclusions in entering the order appealed from herein. Therefore, if there is anything in the record to sustain the exercise of discretion by the District Court, the order appealed from must be sustained. (See Section II, *supra.*) Appellants sought to file the proffered complaint under Section 501 of the LMRDA. (C.T. 65.) That section provides in part that: "No such proceeding shall be brought except upon leave of the Court obtained upon verified application and for good cause shown, which application may be made ex parte." The requirement for showing good cause is in addition to that requiring a verified application. If this were not so the language requiring a showing of good cause would be surplusage.

> "It cannot be assumed that the Legislature intended the words . . . [and for good cause shown] to be merely 'surplusage, or . . . a repetition of a provision already made' in the statute." *(Golden Gate Scenic Steamship Lines, Inc. v. Public Utilities Com.* (Sup. Ct. Cal. 1962) 57 Cal.2d 373, 377, 369 P.2d 257, 260.)

> "In construing the statute it should be in such a manner that ' "if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant." ' (citations omitted)" *(Consolidated Flowers Ship. v. Civil Aeronautics Bd.* (9th Cir. 1953) 205 F.2d 449, 450.)

Appellants had the burden of establishing good cause for the filing of the complaint. *(Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.* (9th Cir. 1949) 178 F.2d 541, 547; *Shivel v. Hurd* (D.C.A. Cal. 1954) 129 Cal.App.2d 320, 324, 276 P.2d 895, 898; *Goldberg v. International Testing Corporation* (S.D. Cal. 1962) 30 F.R.D. 367, 368.) The District Court in determining whether, in its discretion, appellants had established good cause for filing the proposed complaint was required to consider the rule that "The federal courts, of limited jurisdiction, cannot and should not intervene in any and every intra-union dispute." *(Edsberg v. Local Union No. 12 of Int. U. of Operating Eng.* (9th Cir. 1962) 300 F.2d 785, 788.)

While Section 501 of LMRDA provides that an application for leave to file a complaint for good cause may be made ex parte, it has been held that:

> "The showing of *good cause* may be made ex parte. By hornbook law any order made ex parte may be set aside either ex parte or on motion.
>
> "The court concludes that no good cause has been shown and that the ex parte order should not have been issued. After our experience with this case, we think the better practice will be to require an adversary proceeding before permitting an action under Sec. 501(b) to be filed."

(Penuelas v. Moreno (S.D. Cal. 1961) 198 F.Supp. 441.)

Where courts have permitted ex parte filing of complaints, the question of good cause has been considered in adversary proceedings on motions to dismiss. *(Holton v. McFarland* (D. Alaska 1963) 215 F.Supp. 372; *Smith v. General Truck Drivers, Etc. Union Local 467* (S.D. Cal. 1960) 181 F.Supp. 14.) In any event, an adversary proceeding was held in this action. In making its order the District Court could look not only to the proposed complaint verified by appellant Horner and affidavit and declaration of Horner, but could consider the weight to be given these documents after hearing and observing Horner on the witness stand and assessing his credibility. In addition, the District Court had before it the file in Action No. 41678 together with testimony, documentary evidence and affidavits presented by appellees. The District Court exercised its discretion in determining whether good cause existed by looking to the whole record. To hold otherwise would eliminate, for practical purposes, the good cause requirement of Section 501(b) and create federal jurisdiction requiring a trial on the merits every time a union member alleged a violation of duty by a union official. (Cf., *Highway Truck Drivers and Helpers Local 107 v. Cohen* (E.D. Pa. 1960) 182 F.Supp. 608, 615.)

b. Facts From Which the District Court Found That Good Cause Was Not Established.

1. The Appellant Who Verified the Proposed Complaint and Filed Supporting Papers Was Not a Member in Good Standing of the District and Only One Alleged Plaintiff Was an Active Seaman.

The only material offered on the merits to support the proposed complaint was the declaration and affidavit of appellant Louis Horner.[4] (C.T. 76, 112.) Horner was the only appellant to verify the complaint. (C.T. 70.) Section 501 of LMRDA provides for actions by a *member* of a labor organization. There was evidence that appellant Horner was not a member in good standing of District at the time appellants sought leave to file the proposed complaint. (R.T. April 15, 1965, pp. 5-10.) It must be assumed that the District Court found that he was not a member of District at the time leave to file the proposed complaint herein was sought. Since Horner was the only appellant to verify the complaint a proper verified complaint was not before the District Court. Also, since Horner's declaration and affidavit were the only items offered by appellants to show good cause in support of the proposed complaint, the District Court did, in its discretion, find that good cause had not been established. (See: *Perscio v. Daley* (S.D.N.Y. 1965) 239 F.Supp. 629.)

Furthermore, even if it be assumed, for argument only, that Horner was a member of the District when

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[4]Counsel for appellants filed a declaration, not dealing with the merits, with respect to appellants' ex parte request to file the proposed complaint. (C.T. 72.)

leave was sought to file the complaint, the record shows that he was a pensioner and not an active seaman; that appellant Romero was a real estate salesman and had not been to sea since 1954; that appellant Connolly was a pensioner; that appellant Riemers was retired on social security and that appellant Bell was the only active seaman among appellants. (R.T. March 31, 1965, pp. 49-50.) Furthermore, the record indicates that appellant Bell did not make any prior demand requesting union action with respect to this matter. (Exhibits C, D, E, F and G attached to affidavit of Wesley A. Ferron, C.T. 80.) Therefore, Bell is not a proper party plaintiff in the proposed complaint. (*Perscio v. Daley, supra.*) In these circumstances the District Court could conclude that good cause was not shown for these appellants to file the proposed complaint.

2. The MEBA Retirement and Severance Plan Was Properly Adopted.

Appellants attack the MEBA Retirement and Severance Plan on the ground that it was entered into on May 1, 1959 without any valid authorization. (C.T. 67.) Horner's affidavit in Action No. 41678 indicates the passage of Resolution No. 327 by Local 97 on July 5, 1957. (C.T. 24.) A copy of Resolution 327 was attached. (C.T. 29.) It is appellants' contention that since the resolution uses the words "retirement program" the *severance* portion of the MEBA Retirement and Pension Plan was not authorized. However, the District Court could properly conclude, from

modern common experience, that the terms "retirement program" and "retirement plan" encompassed the severance portion of the plan.

> "From modern common experience, it is known that one pension plan may take care of the pensioner himself. Another plan specifically takes care of the pensioner's widow or perhaps minor children in addition to the pensioner." (*Ulmann v. Sunset-McKee Company* (9th Cir. 1955) 221 F. 2d 128, 132.)

It is clear that modern retirement plans utilize severance provisions.

> "*Qualified pension plan as means of providing dismissal payments.*—Most union contracts call for payment of dismissal wages if an employee should be discharged through no fault of his own. A qualified pension plan is a convenient way of budgeting for this contingency, although the plan must not be *primarily* a dismissal-wage scheme, or it will not qualify under §401(a).
>
> Unions today regard dismissal wage payments as a proper and recognized condition of employment, hence a valid subject of collective bargaining. The basic premise is that while an employee may not have a vested interest in his job, he may have a substantial expectancy in it. The right to dismissal wages is therefore claimed to be based upon the employer's implied promise to continue employment so long as duties are discharged satisfactorily.
>
> *Reserve is impractical.*—Yet the need for paying dismissal wages may arise at the exact time

when the employer can least afford to pay them. Of course, he could establish an accounting reserve for payment of dismissal wages. In most cases, however, this would be unwise because it would tie up working capital against an event that might never occur. Moreover, the reserve would consist of 'net after tax' funds, since amounts allocated to it would not be deductible for income tax purposes.

Advantages of qualified plan.—In addition to the main benefits accruing to management and employee under any qualified plan, one providing severance benefits upon involuntary dismissal for reasons other than an employee's dishonesty, etc., possesses these obvious advantages:

(1) Funds accumulated primarily against an employee's retirement or death are instantly available for legal diversion at the earlier occurrence of forced termination of employment.

(2) Funds are not segregated solely to provide dismissal wages but to hedge three contingencies—forced severance, retirement, death—one of which is bound to occur unless an employee should leave of his own accord or be discharged for cause.

(3) The employer's expense is reduced because:

(a) his contributions are deductible from gross income in the year made, within the limitations provided in §404(a), and

(b) the fund is swelled by its own earnings, which are tax-exempt under §401(a).

Lump-sum payments.—Unions favor lump-sum severance benefits from a qualified trust not only because they cushion the shock of unemployment

but also because they get long-term capital gain treatment. This means that normally a terminated employee will include only half of the benefit in his gross income.

Illustrative provision.—The B. F. Goodrich Company added a severance benefit provision to its pension plan and got Treasury approval. Here is how the Goodrich provision works:

To be eligible for a termination payment, an employee must have at least five years of continuous service credit. He must be ineligible for a pension and be released from employment (a) because he has reached his normal retirement date or (b) because he is physically or mentally unable to meet the requirements of his job and cannot qualify for transfer to another job. The severance payment is made in a lump sum.

The amount paid to an employee who has reached the normal retirement date is a sum equal to one and one-half weeks' pay for each year of continuous service credit (taken to completed twelfths). As for other terminated employees, their lump-sum payments depend on years of service according to the following schedule:

1. For an employee having five or more but less than ten completed years of continuous service credit—one week's pay for each year of continuous service credit.

2. For an employee having ten or more but less than fifteen completed years of continuous service credit—one and one-fourth weeks' pay for each year of continuous service credit.

3. For an employee having fifteen or more years of continuous service credit—one and one-

half weeks' pay for each year of continuous service credit.

If an employee who has not reached normal retirement date is entitled to any severance allowance provided by law, then the part of such allowance attributable to company contributions is deducted from the severance payment from the pension plan.

Severance payments according to the above schedule are also available to workers whose employment is terminated as the result of a plant shutdown, provided they are not otherwise entitled to pensions. An employee eligible for a deferred vested pension can get a severance payment if he makes an election in writing to receive the severance payment instead of the deferred vested pension."

(Prentice Hall Pension and Profit Sharing Reporter ¶2035.)

3. Even If It Be Assumed, for the Sake of Argument Only, That the MEBA Retirement and Severance Plan Was Not Properly Adopted, the Plan Was Duly Ratified by the Members of the District.

If it be assumed arguendo that the MEBA Retirement and Severance Plan was not properly adopted, it was duly ratified by the District membership. The doctrine of ratification was aptly stated by Lord Eldon:

"It is established by all the cases that if the *cestui que trust* joins with the trustees in that which is a breach of the trust, knowing the circumstances, such a *cestui que trust* can never complain of such breach of trust. I go further,

and agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees. . . ." (*Walker v. Symonds,* 3 Swanst. 2, 64.)

"After a breach of trust has occurred, a beneficiary may expressly or impliedly express satisfaction with the act and thereby prevent himself from claiming thereafter that it was illegal. This transaction is sometimes described by the name 'ratification,' or 'confirmation,' or 'acquiescence.' Its essence is that the beneficiary unequivocally declares that he does not regard the act in question as a breach of trust but rather elects to treat it as a lawful transaction under the trust. He has the election of disaffirming the transaction or of accepting it.

Ratification binds a successor trustee acting for the beneficiary in making a claim against a predecessor trustee, and also successors in ownership of the beneficiary's interest. A successor trustee may act for the beneficiary in ratifying an act of a predecessor trustee.

Ratification may occur by an express statement of the attitude of the beneficiary, as, for example, by a verbal statement to the trustee, or by an informal or written document delivered to the trustee, or ratification may be implied from the conduct of the cestui, as, for example, from the acceptance of the results or benefits from the act in question, without a claim that there had been a breach.

It would seem that there need be no consideration for ratification, although it sometimes does exist.

The doctrine of ratification is applied in the law of principal and agent, master and servant, and corporations. An otherwise unlawful or unauthorized act may be validated after it has been performed."

(Bogert, Trusts and Trustees, §942.)

Phillips v. Sanger Lumber Co. (Sup. Ct. Cal. 1900) 130 Cal. 431, 62 Pac. 749;

Petray v. First Nat. Bank (D.C.A. Cal. 1928) 92 Cal. App. 86, 267 Pac. 711;

In re Marble (Sup. Ct. Me. 1938) 136 Me. 52, 1 A.2d 355;

Coulter Estate (Sup. Ct. Pa. 1954) 379 Pa. 209, 218, 108 A.2d 681;

Wilbur's Estate (Sup. Ct. Pa. 1938) 334 Pa. 45, 55, 5 A.2d 363.

The District's by-laws provide that:

"A majority vote of the membership shall be authorization for any Union action, unless otherwise specified in the National Constitution or these By-Laws." (By-Laws of Pacific Coast Dist., Art. I, Exhibit H attached to Affidavit of Wesley A. Ferron, filed on March 31, 1965, C.T. 80, also found in Supp. C.T. attached to affidavit of Wesley A. Ferron.)

The District's by-laws also provide that:

"When applicable to the District as a whole, the term 'majority vote of the membership' shall mean the majority of all the valid votes cast by members at an official meeting of those branches holding a meeting. This definition shall prevail, notwithstanding that one or more Branches can-

not hold meetings because of no quorum."[5] (By-Laws of Pacific Coast Dist., Art. XX, Sec. 3, Exhibit H attached to affidavit of Wesley A. Ferron, C.T. 80, also in Supp. C.T. attached to affidavit of Wesley A. Ferron.)

The District has branches in San Francisco, California; Seattle, Washington; Portland, Oregon; Wilmington, California and Honolulu, Hawaii. District Headquarters is in San Francisco. (By-Laws of Pacific Coast Dist., Art. III, Sec. 2, *supra.*) The minutes of the meeting of the District's San Francisco Branch on February 11, 1965, indicate that 188 members were present and that the following occurred:

"Motion by V. Romero, seconded by L. Horner: 'I move that the Pacific Coast District instructs its officers to file suit to recover the funds paid by the District to the M.E.B.A. Officers' Retirement and Severance Plan on behalf of the various officers of the District. I so do move because these funds were paid into the Officers' Retirement and Severance Plan as a result of violations by the Officers of fiduciary duties to the Union and its members under the law of California, and also under Section 501 (a) of the Federal Labor Management Reporting and Disclosure Act of 1959'. The Chair stated that the motion was simi-

[5]Appellants state, at page 20 of their opening brief, "Respecting the Branch votes, appellees failed to indicate below how a Branch vote could constitute ratification on behalf of the entire District." This contention is not correct. The District's By-Laws were before the District Court, and it is clear from the by-laws above-cited that when the District as a whole votes, it does so by Branches.

lar to the one presented a year previously. Vote on motion, 7 for, 95 against, motion lost."

(Exhibit D attached to affidavit of Wesley A. Ferron, C.T. 80.)

A similar motion by Horner had been presented at the December 5, 1963 meeting of the San Francisco Branch and was defeated 59-21. (R.T. April 15, 1965, pp. 12-13; Exhibit C attached to Affidavit of Wesley A. Ferron, C.T. 80; Exhibit attached to Affidavit of W. A. Ferron, Supp. C.T.) Horner admitted that he was not in any way prevented from speaking on his motion in the open union meeting. (R.T. April 15, 1965, p. 13.)

The minutes of the District's Wilmington Branch for February 8, 1965 indicate that 60 members were present and that the following occurred:

"The Chair read a letter dated January 27, 1965 from Brother Louis Horner to the District Executive Committee of the M.E.B.A., Pacific Coast District, to take such action as may be necessary to recover all contributions paid by the District to the National M.E.B.A. Retirement and Severance Fund. Brother John Connolly read a prepared motion as follows:

'I move that the Pacific Coast District instructs its officers to file suit to recover the funds paid by the District to the M.E.B.A. Officers' Retirement and Severance Plan on behalf of the various officers of the District. I do so move because these funds were paid into the Officers' Retirement and Severance Plan as a result of violations by the officers of fiduciary duties to

the union and its members under the law of California, and also under Section 501(a) of the Federal Labor Management Reporting & Disclosure Act of 1959.

'This action must be taken prior to the regular meeting at San Francisco, March 11, 1965.

'/s/ John L. Connolly.'

"The motion was seconded by Brother Andrew DiMiceli.

"Brother Connolly answered a question about the time limit in the last sentence of the motion. Brother Horner made a few remarks about the reason for the motion. Various brothers expressed themselves. President Ferron took the floor and made a statement about the Plan and the fact that all newly elected officials had their choice between the MEBA-PMA Pension Plan or the MEBA Retirement and Severance Plan, but not both, and that there were various instances where the members had received severance payments when their ships were sold foreign.

"After President Ferron spoke, Brother Horner asked again for the floor to give, as he stated, 'his rebuttal.' President Ferron challenged Brother Horner because he had previously spoken a couple of times. The issue was decided by the members who voted in a majority to let Brother Horner continue speaking.

"After Brother Horner finished speaking, President Ferron took issue with some statements made by Brother Horner.

"Brother Pelick moved the previous question, seconded by Brother John DerBoghosian. It was

explained by the Chair that this would stop debate and place the original motion on the floor for a vote. A vote was taken on Brother Pelick's motion and by a show of hands there was no opposing votes, so Brother Connolly's motion was put to a vote. The Tellers counted 4 for the motion and 20 opposed to the motion. The motion lost."

(Exhibit E attached to affidavit of Wesley A. Ferron, C.T. 80.)

The minutes show and Horner admits that he spoke in support of his resolution at Wilmington. (R.T. April 15, 1965, p. 15.) The minutes of the District's Seattle Branch for March 10, 1965 indicate that 54 members were present and that the following occurred:

"The minutes of San Francisco, Wilmington and Portland were read. No meeting was held in Honolulu last month due to lack of a quorum. Brother Salovich re-read the motions made by Brother Connolly in Wilmington and Brother Romero in San Francisco re the MEBA Officers' Retirement & Severance Plan. Motion was made by Brother F. E. Walton, seconded by Brother Axel Edblad to approve the minutes of the other ports as read, and to concur with the action of the membership in San Francisco and Wilmington in rejecting the motion of Brothers Connolly and Romero re MEBA Officers' Retirement & Severance Plan. Motion carried, 42 FOR; 0 AGAINST."

(Exhibit F attached to affidavit of Wesley A. Ferron, C.T. 80.)

The minutes of the District's Portland Branch for March 9, 1965 indicate that 11 members were present and that the following occurred:

> "Unfinished Business and Minutes of other Ports: Minutes of Wilmington Branch of February 8, 1965 were read, minutes of Seattle Branch of February 10, 1965 were read and minutes of San Francisco of February 11, 1965 were read. The Chair called attention to the Motion by Brother John L. Connolly, re: MEBA Retirement and Severance Fund, in the Wilmington minutes and the Motion by Brother V. Romero, re: MEBA Retirement and Severance Fund, in the San Francisco minutes. After discussion it was moved by Brother Geo. Miller and seconded by Brother J. F. Yarger that the minutes of Wilmington, Seattle and San Francisco be approved as read, and that the Motions of Brothers Connolly and Romero be rejected. Vote on Motion, 10 for, 0 against. Motion Carried."
>
> (Exhibit G attached to affidavit of Wesley A. Ferron, C.T. 80.)

As indicated, the Honolulu Branch had no meeting in February because of lack of a quorum.

The record also indicates that on December 18, 1963 the District's Executive Committee adopted the following resolution:

> "Moved and seconded that the PCD make contributions on full time paid officials of PCD to MEBA-PMA Pension Plan who are not covered by the Union Retirement Severance Plan and who have not established twenty (20) years

credits under the MEBA-PMA Pension Plan. Adopted."

(Exhibit A attached to affidavit of Wesley A. Ferron, C.T. 80.)

The minutes of the January 9, 1964 meeting of the San Francisco Branch indicate that 198 members were present and that the actions taken by the Executive Committee, including the one set forth above, were approved by a vote of 64-2. (Exhibit B attached to Affidavit of Wesley A. Ferron, C.T. 80.)

In addition, the District payments to the MEBA Retirement and Severance Plan are included in quarterly financial statements which are voted on and approved by the members of the District. (R.T., March 31, 1965, pp. 40-42.)

All the alleged facts, upon which appellants rely, were contained in a report of a committee, of which Horner was a member, made during July of 1961. (C.T. 22, 26, 63.) The record indicates that Horner has not been impeded from asserting his views and presenting motions against the MEBA Retirement and Severance Plan at union meetings. Yet, with Horner's version of the facts before them, the members of District have, on every occasion, voted in favor of the plan. If the members of District believed that the plan was unauthorized or that they did not wish it to be continued they would not continue to vote money for payments and they would have voted for Horner's resolution. It is clear that the various votes by the members of the District cited above, with full disclo-

sure and open discussion before the membership, clearly constituted ratification of the MEBA Retirement and Severance Plan, even assuming arguendo that the plan was not properly authorized in its inception.

4. Appellants Did Not Exhaust Their Internal Union Remedies.

Appellants devote a good portion of their Opening Brief to the question of whether exhaustion of union remedies is a prerequisite for bringing a suit under Section 501(b) of LMRDA. (Appellants' Opening Brief, pp. 24-30.) In this discussion they point to a conflict in cases on this point. Appellees contend that the line of cases, headed by *Penuelas v. Moreno, supra,* which hold that exhaustion of internal remedies is a prerequisite to bringing suit, is correct. However, appellees see no need to dwell on this point. Even if it be assumed, for the sake of argument only, that exhaustion of internal union remedies is not a mandatory prerequisite for bringing a suit under Section 501(b) of LMRDA, it is still a factor which may be considered in the exercise of discretion by the District Court on whether good cause exists.

> "We need not decide whether exhaustion of remedies provided by the Union is an absolute requirement before asking the federal courts to intervene in intra-union activities. Penuelas v. Moreno, S.D. Cal. 1961, 198 F.Supp. 441; Acevedo v. Bookbinders & Machine Operators Local No. 25, S.D.N.Y., 1961, 196 F.Supp. 308; Smith v. General Truck Drivers, Union Local 467, S.D. Cal., 1960, 181 F.Supp. 14; Holderby v. International Union of Operating Engineers, Local Un-

ion No. 12, 1955, 45 Cal.2d 843, 291 P. 2d 463. But Cf. Detroy v. American Guild of Variety Artists, 2 Cir. 1961, 286 F.2d 75.

"We find here no uncertain or futile remedy offered to appellants by their own organization. In the absence of such a factual situation, we recognize and reaffirm 'the declared policy [of the courts] favoring self regulation by unions,' Detroy v. American Guild of Variety Artists, supra at 81."

(*Edsberg v. Local Union No. 12 of Int. U. of Operating Eng.* (9th Cir. 1962) 300 F.2d 785, 787, 788.)

The record indicates that appellants could (1) request the membership not to approve appropriations for the MEBA Retirement and Severance Plan; (2) request the District Executive Committee to submit a referendum on the issue; (3) bring the matter to the National Executive Committee and (4) bring charges against the officials of District. (C.T. 138.) The National MEBA Constitution is attached to the affidavit of W. A. Ferron in Supp. C.T. as well as a copy of District's By-Laws. The By-Laws are also found in Exhibit H attached to the Affidavit of Wesley A. Ferron, C.T. 80.)

While appellants state that exhaustion of the internal union remedies indicated would be "futile and unreasonable" (Appellants' Opening Brief, p. 31) the record indicates that this contention is not correct. For example, while appellants claim that calling a referendum is discretionary with the District Ex-

ecutive Committee, appellant Horner's own testimony indicates the simple procedure utilized by a member to obtain a referendum on another issue. (R.T. April 15, 1965, pp. 10-11.) Furthermore, the District Court, which had the National MEBA Constitution and District's By-Laws before it, and which observed the credibility of Horner, could have determined that appellants did not desire to utilize any internal remedies which might be available to them.

5. The Proposed Complaint Is Stale and Barred by the Statute of Limitations.

The contention was raised in Action No. 41678 that the matters sought to be complained of in this action were barred by the statute of limitations. The District Court was aware of this contention. If leave to file the proposed complaint herein were granted, appellees contend it is since barred by the statute of limitations of three years.

The LMRDA contains no limitations period. When an action is brought in a United States District Court to enforce a federally created right in which the federal statute contains no limitations period, the District Court must apply the analogous statute of limitations of the state in which it is sitting. (*Cope v. Anderson,* 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602; *McClaine v. Rankin,* 197 U.S. 154, 25 S.Ct. 410, 49 L.Ed. 702; *Burnham Chemical Co. v. Borax Consolidated* (9th Cir. 1948) 170 F.2d 569, cert. denied, 336 U.S. 924, 69 S.Ct. 655, 93 L.Ed. 1086, rehearing denied, 336 U.S. 955, 69 S.Ct. 878, 93 L.Ed. 1109, motion denied, 337 U.S. 961, 69 S.Ct. 1529, 93 L.Ed. 1760.)

The statute of limitations applicable to an action attempted to be filed under LMRDA in the Northern District of California is Section 338(1) of the California Code of Civil Procedure. (*Burnham Chemical Co. v. Borax Consolidated, supra,* 170 F.2d 569; *Culver v. Bell & Loffland* (9th Cir. 1944) 146 F.2d 29; *Farris v. San Diego Federal Savings & Loan Association* (S.D. Cal. 1956) 140 F.Supp. 703; see also *Levy v. Paramount Pictures* (N.D. Cal. 1952) 104 F.Supp. 787; *Englander Motors, Inc. v. Ford Motor Company* (6th Cir. 1961) 293 F.2d 802; *Alvado v. General Motors Corporation* (S.D.N.Y. 1961) 194 F.Supp. 314; *Delman v. Federal Products Corporation* (D.R.I. 1955) 136 F.Supp. 241.)

Section 338(1) of the California Code of Civil Procedure provides that "An action upon a liability created by statute, other than a penalty or forfeiture" must be brought within three years. Aside from the proposed complaint being time barred on its face, appellant Horner's own statements indicate that he was aware of all the matters alleged in the proposed complaint by July of 1961. (C.T. 22, 26, 63.) The motion for leave to file the proposed complaint was presented on March 31, 1965. (C.T. 145.) This was almost seven years from the execution of the trust agreement on May 1, 1959 and more than three years from July of 1961. Assuming, for the sake of argument only, that a cause of action once existed, under these circumstances it was clearly barred by the statute of limitations. The District Court, applying its discretion as to whether there was good cause for

filing the proposed complaint, could have determined that the complaint contained a stale claim barred by the statute of limitations of three years.

6. Appellants Did Not Comply With Rule 23(b), Federal Rules of Civil Procedure.

Rule 23(b) of the Federal Rules of Civil Procedure deals with class actions. Appellees contended that the proposed complaint did not meet the requirements of the rule. (C.T. 110.) Rule 23(b) refers to "an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it. . . ." Appellants, by attempting to file the proposed complaint "for the benefit of The Pacific Coast District of National Marine Engineers' Beneficial Association, an unincorporated association" (C.T. 65) come within the purview of Rule 23(b). That rule also provides that:

> "The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

The District Court had before it the Constitution of the National MEBA and the District's By-Laws, which indicated that internal union remedies were available to appellants. The District Court could properly conclude that the general allegations in

paragraph VIII of the proposed complaint (C.T. 68) did not meet the requirements of Rule 23(b).[6] The District Court, in exercising its discretion on whether good cause for filing the proposed complaint existed, could also have found that failure to conform to Rule 23(b) indicated a lack of good cause.

CONCLUSION

On each of the foregoing grounds there was sound and sufficient reason for the ruling of the District Court and appellees submit that the District Court's order denying leave to file the proposed complaint should be affirmed.

Dated, San Francisco, California,
January 5, 1966.

Respectfully submitted,
JARVIS, MILLER & STENDER,
By MARTIN J. JARVIS,
Attorneys for Appellees, W. A. Ferron, Henry Borello, W. H. Buttram, Robert H. Horne, C. W. Jenkins, F. E. Walton, C. Black, H. Coleman, S. R. Franks, George B. Salovich and Francis H. Rogers.

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[6]If appellants had alleged what they had done with particularity, they would have necessarily disclosed, among other things, the votes of the District membership at the various Branch meetings, adverse to their contentions ratifying the MEBA Retirement and Severance Plan, even if initial improper adoption were to be assumed arguendo.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Martin J. Jarvis,
Attorney for Appellees.